Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LOYD E. HALL and JOSEPH R. WILLIE, II,
Petitioners,

v.

SAN BERNARD ELECTRIC, INC. and
HARRISON R. FISHER, SR.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. On a motion under Rule 60(b)(3) and Rule 60(b)(6) of the Federal Rules of Civil Procedure alleging fraud, misconduct and the validity and scope of a disputed settlement agreement, is the court required to conduct an evidentiary hearing to satisfy the tenets of the Due Process Clause of the Fifth Amendment to the United States Constitution?

2. As mandated by Rule 83 of the Federal Rules of Civil Procedure, did the court violate the Due Process Clause by not enforcing Rules 6A and 6D of the Local Rules of the United States District Court for the Southern District of Texas?

3. Can sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure be imposed when the court did not allow the presentation of evidence and testimony in a hearing on a motion under Rule 60(b)(3) and Rule 60(b)(6)?

LIST OF PARTIES

Petitioners certify that the following is a complete list of the names of all parties:

PETITIONERS:

Loyd E. Hall
Joseph R. Willie, II

RESPONDENTS:

San Bernard Electric Cooperative, Inc.
Harrison R. Fisher, Sr.

ATTORNEYS:

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IN THE

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OCTOBER TERM, 1993

LOYD E. HALL and JOSEPH R. WILLIE, II,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PRAYER

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners herein pray that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that court's January 6, 1993 Judgment and Opinion in this proceeding.

OPINIONS/ORDERS BELOW

The Order denying the Petition for Rehearing En Banc of the United States Court of Appeals for the Fifth Circuit entered February 8, 1994 is reported at ___ F.3d ___ (5th Cir. 1994), and is attached as Appendix "A."

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered on January 6, 1994, and from which review is sought, are attached as Appendix "B."

The Order of the United States District Court for the Southern District of Texas entered October 15, 1992, and from which Petitioners appealed, is attached as Appendix "C."

The Final Judgment of the United States District Court for the Southern District of Texas entered November 21, 1991, is attached as Appendix "D."

JURISDICTION

The Opinion of the United States Court of Appeals for the Fifth Circuit was entered January 6, 1994. This Petition for Certiorari is within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case arises under the Fifth Amendment to the United States Constitution, Rule 83 of the Federal Rules of Civil Procedure and Rules 6A and 6D of the Local Rules of the United States District Court for the Southern District of Texas. These rules are reprinted in the Appendix as Appendices "E," "F," and "G."

STATEMENT OF THE CASE

This is an action pursuant to Rule 60(b)(3) and Rule 60(b)(6) of the Federal Rules of Civil Procedure. Petitioner Loyd E. Hall's

Original Complaint was filed on July 8, 1991. 2R. 1-5. Among other things, it sought to hold the Respondent, San Bernard Electric, Inc., liable for violations of Petitioner's civil rights by intentionally and purposefully discriminating against him due to his race in violation of 42 U.S.C. §§ 1981, 1988 and 42 U.S.C. § 2000e *et seq.* On July 30, 1991, the Respondent, San Bernard Electric, Inc., pursuant to Rule 12(b)(6) and Rule 12(f) of the Federal Rules of Civil Procedure, filed a motion to dismiss and motion to strike against Petitioner. 2R. 11-29. The basis for the Respondent's motions were that 42 U.S.C. § 1981 is not available to redress alleged discriminatory employment termination and that punitive damages were not available under 42 U.S.C. § 2000e *et seq.* On September 19, 1991, Judge Lynn N. Hughes entered an order granting Respondent's motion to dismiss and motion to strike. 2R. 32.

On November 14, 1991, Petitioner's former counsel, Harrison R. Fisher, Sr., Respondent, filed a motion to withdraw. 2R. 47-48. On November 18, 1991, the Respondent, San Bernard Electric, Inc., filed its Motion to Enforce Settlement Agreement. 2R. 49-52 and 2R. 33-46. On November 25, 1991, Judge Hughes entered a final judgment enforcing the settlement agreement, dismissing Petitioner's claims with prejudice and granting the motion to withdraw. 2R. 54. Petitioner timely filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to vacate and set aside the final judgment due to fraud and misconduct. 2R. 55-123. On October 15, 1992, Judge Hughes entered an order denying Petitioner's Rule 60(b) motion and imposed monetary sanctions against Petitioner and his Attorney of Record pursuant to Rule 11 of the Federal Rules of Civil Procedure, 1 R. 215, and Petitioner timely appealed from that order. 1R. 218.

Petitioner's appeal was calendared for oral argument for the week of January 3, 1994. By letter dated November 19, 1993 (less than seven weeks before oral argument), Petitioner's counsel was notified that Petitioner's case was being removed inexplicably from the oral argument calendar. Petitioner filed a motion for the court to reconsider the removal, and said motion was denied by Circuit Judge Jerry E. Smith.

On January 6, 1993, a panel of the Fifth Circuit consisting of Henderson, Smith and Emilio M. Garza, Circuit Judges, issued a per curiam opinion affirming the trial court's denial of Petitioner's Rule 60(b) motion and affirming the imposition of Rule 11 sanctions. The court held that due process was preserved because the trial court had affidavits before it, and the panel considered that sufficient for the hearing. Panel Opinion at 8 (Appendix B-6 - B-7).

The panel stated in its Opinion that Respondent's Motion to Enforce Settlement Agreement was in the nature of a motion for summary judgment. Panel Opinion at 10 (Appendix B-8).

The panel, in footnote 1 in the Opinion on page 10 (Appendix B-8), states:

> Hall argues that the exception is not relevant because Fed. R. Civ. P. 56 does not specifically enumerate an action to enforce settlement agreement as a type of summary judgment. The term 'claim' in rule 56(a), however, is broad enough to include the type of action here.

The panel reached its decision without citing case authority, and the opinion is in direct conflict with the Fifth Circuit decisional law and with the decisional law of the courts of appeals of three circuits.

The Petitioners timely filed a Petition for Rehearing En Banc which was denied on February 8, 1994. The present Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. Petitioner was denied his right to Due Process of law as required by the Fifth Amendment to the U.S. Constitution by the trial court judge, who refused to allow the presentation of evidence and live testimony, and failed to assure a full and fair hearing.

Petitioner's contention is that he did not receive an evidentiary hearing on his Rule 60(b) motion in the trial court. While it is true that the trial court received affidavits and heard the argument of

counsel, the trial court refused to admit evidence and refused to receive live testimony.

The Fifth Circuit in *Cia Anon Venezolana de Navegacion v. Harris*, 374 F.2d 33, 36 (5th Cir. 1967), held that "[t]he court is required to conduct an evidentiary hearing to ascertain the validity and scope of disputed agreement." *See also Mid-South Towing Co. v. Har-Win, Inc.*, 733 F.2d 386, 387 (5th Cir. 1984).

The Fifth Circuit has further held that the affidavits and the argument of counsel do not constitute an evidentiary hearing. *Mid-South Towing*, 733 F.2d at 388, 390-91.

Without providing an evidentiary hearing, the district court erred when it refused to vacate the alleged settlement agreement. In *Wang Laboratories, Inc. v. Applied Computer Sciences, Inc.*, 958 F.2d 355, 359 (Fed. Cir. 1992), the court held that "a district court does not have the power to impose a settlement agreement when there was never a meeting of the minds." The court also went on to hold that "[i]t [a district court] does not have the power to make an agreement for the parties or to decide, contrary to the facts and the law, that a draft settlement agreement was binding when the parties did not agree on it." *Id.*; *see also Ozyagcilar v. Davis*, 701 F.2d 306, 308 (4th Cir. 1983); *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987). The "circuit split" and the ignoring of its decisional law by a panel of the Fifth Circuit represent sound reasons why this petition should be granted.

II. The Fifth Circuit's decision to apply a "summary judgment" standard to an alleged settlement agreement directly conflicts with its own decisional law and the decisional law of the United States Court of Appeals for the Fourth Circuit, the United States Court of Appeals for the Ninth Circuit, and the United States Court of Appeals for the Federal Circuit.

The Fifth Circuit has succinctly stated that a motion to enforce a settlement agreement "*is not a motion for summary judgment*, but as 'a hearing by the District Court in the exercise of its inherent power to summarily enforce settlements entered into by parties

litigant in a pending case.'" *Mid-South Towing*, 733 F.2d at 390 (emphasis added).

Absent en banc reconsideration of *Mid-South Towing*, which does not appear likely, the holding quoted above will remain the decisional law of the Fifth Circuit.

The decision of the panel to classify Respondent's Motion to Enforce Settlement Agreement as a motion for summary judgment has created "new law" without en banc consideration by the Fifth Circuit. This "new law" has caused an apparent split between the Fifth and the Fourth, Ninth, and Federal Circuits on the enforcement of settlement agreement issue. *See Wang Labs., Inc. v. Applied Computer Sciences, Inc.*, 958 F.2d 355 (Fed. Cir. 1992); *Callie v. Near*, 829 F.2d 888 (9th Cir. 1987); *Ozyagcilar v. Davis*, 701 F.2d 306 (4th Cir. 1983). The "rogue" decision by the panel and the circuit split in question constitute an intolerable situation which should be resolved by the Supreme Court.

III. The Fifth Circuit's decision to ignore Rule 6A and Rule 6D of the Local Rules of the United States District Court for the Southern District of Texas directly conflicts with Rule 83 of the Federal Rules of Civil Procedure.

It is very clear that Rule 56 of the Federal Rules of Civil Procedure does not apply to Respondent's Motion to Enforce Settlement Agreement. As such, Respondent's motion is subject to Rule 6A and Rule 6D of the Local Rules of the United States District Court for the Southern District of Texas, and Respondent's motion must contain the required averments, and Petitioner must be given the requisite twenty (20) days to respond.

Respondent's Motion to Enforce Settlement Agreement was not pending before the district court on November 18, 1991 as envisioned by Rule 16(c)(9) of the Federal Rules of Civil Procedure. It is undisputed that the Respondent filed its motion on the very day the pretrial conference was held. The response date to the motion, as noted by page 2, entry #11 of the docket sheet of the district court, was December 9, 1991.

Rule 83 of the Federal Rules of Civil Procedure provides that the district court can promulgate local rules to govern its practice as long as the "local rules" are not inconsistent with the federal rules and the local rules "*shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located.*" (Emphasis added).

At the time of Petitioner's Rule 60(b) motion, neither occurrence had taken place, and the *shall* language of Rule 83 is mandatory and binding on the Fifth Circuit as well as the district court. The panel, by its Opinion at 9-11 (Appendix B-7 – B-9), has abrogated Rule 83 as well as Local Rules 6A and 6D without a mandate from the judicial council of the Fifth Circuit or without amendment by the district court. The opinion of the panel and the actions of the district court violated Petitioner's Due Process rights by not enforcing the Local Rules of the United States District Court for the Southern District of Texas. Such is fundamental error, and this issue begs for resolution by the Supreme Court.

IV. The Fifth Circuit's decision to affirm the imposition of Rule 11 sanctions was in direct conflict with its own decisional law and the U.S. Supreme Court's decision in *Alexander v. Gardner-Dever Co.*, 415 U.S. 36 (1974).

In *Alexander v. Gardner-Dever Co.*, 415 U.S. 36, 52 (1974), the Court stated that federal law requires that a settlement of a Title VII claim [whether oral or written] be entered into "voluntarily" and "knowingly" by the Petitioner. *See also Mosely v. St. Louis Southwestern Ry.*, 634 F.2d 942, 946 (5th Cir. 1981).

Without resolving the factual and legal issues surrounding the settlement by an evidentiary hearing, the district court and the Fifth Circuit panel imposed Rule 11 sanctions under an erroneous view of the law.

The Fifth Circuit in *Smith v. Our Lady of the Lake Hospital*, 960 F.2d 439 (5th Cir. 1992), stated that the imposition of sanctions under Rule 11 is an abuse of discretion where sanction is based upon erroneous view of the law. The district court refused to let the Petitioner examine or cross-examine witnesses which

could validate Petitioner's allegations. On the contrary, the district court had no facts, evidence or testimony on which to impose Rule 11 sanctions on the Petitioner and his Attorney of Record.

The Fifth Circuit in *Smith International v. Texas Commerce Bank*, 844 F.2d 1193 (5th Cir. 1988), held: "Rule 11 does not make the signature on a pleading or other covered document an absolute guarantee as to the correctness of the theory of law on which it is grounded, but only that 'reasonable inquiry' has been made in that respect." *Id.* at 1199.

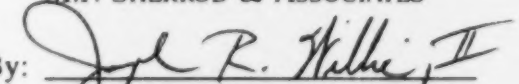
The panel based its opinion on supposition and conjecture and not on the "law of the case" as it applies to Fifth Circuit precedent. The Supreme Court should exercise its supervisory powers over the federal courts to resolve this issue.

CONCLUSION

For the foregoing reasons, Petitioners pray that a Writ of Certiorari issue to review the January 6, 1993 Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

M.P. SHERROD & ASSOCIATES

By: 

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2817

LOYD E. HALL,

Plaintiff-Appellant,

and
JOSEPH R. WILLIE,

Movant-Appellant,

versus
SAN BERNARD ELECTRIC, INC.

Defendant-Appellee,

and
HARRISON R. FISHER, SR.,

Movant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion January 6, 1994, 5 Cir., , F.3d)

(FEBRUARY 8, 1994)

Before HENDERSON * , SMITH and EMILIO M. GARZA, Circuit Judges

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active

service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
United States Circuit Judge

* Circuit Judge of the Eleventh Circuit, sitting by designation.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2817

LOYD E. HALL,

Plaintiff-Appellant,

and

JOSEPH R. WILLIE, II,

Movant-Appellant,

VERSUS

SAN BERNARD ELECTRIC COOPERATIVE, INC.,

Defendant-Appellee,

and

HARRISON R. FISHER, SR.,

Movant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(CA-H-91-1890)

Before HENDERSON,* SMITH, and EMILIO M. GARZA, Circuit Judges.

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*Circuit Judge of the Eleventh Circuit, sitting by designation.

PER CURIAM:**

I.

San Bernard Electric Cooperative, Inc. ("San Bernard"), is a rural electric cooperative headquartered in Bellville, Texas. Loyd Hall is a black male who was employed by San Bernard until his termination on February 7, 1991. Movant-appellee Harrison Fisher was Hall's attorney until he withdrew from representation on November 14, 1991. Movant-appellant Joseph Willie is now Hall's attorney of record.

Hall sued San Bernard, alleging discrimination because of his race in violation of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and 42 U.S.C. § 1981. At that time, Hall was represented by Fisher. San Bernard filed its answer, along with motions under FED. R. CIV. P. 12(b)(6) and (f) seeking, among other things, to have Hall's claim under § 1981 dismissed for failure to state a claim upon which relief could be granted and to strike Hall's claim for punitive damages.

At a pretrial conference, the court dismissed Hall's § 1981 and punitive damages claims. Following the conference, Grace Renbarger, counsel for San Bernard, told Fisher that San Bernard would settle all of Hall's claims for $5,000. Fisher claims that Hall told him to settle the case, without further consultation, for whatever Fisher could get. Hall denies giving Fisher such authority.

Renbarger and Fisher orally agreed to settle Hall's case against San Bernard. In consideration of $6,000 to Hall and his attorney, Hall would dismiss his lawsuit against San Bernard with prejudice, would withdraw his charge that was still pending before the Equal Employment Opportunity Commission, and would execute a general release.

**Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Renbarger forwarded a written settlement agreement memorializing the oral settlement agreement. On October 16, 1991, Fisher and Hall discussed the settlement agreement, with Hall expressing apprehension about accepting the settlement. Fisher advised Hall that it would be difficult, if not impossible, to void the settlement, as Hall had authorized Fisher to settle the case.

Instead of signing the settlement agreement, Hall took a copy of it with him and left Fisher's office. Hall denies that he and Fisher discussed the settlement agreement at the October 16 meeting and asserts that he never saw the settlement papers until November 14. On that date, however, Hall signed a letter indicating that he had reviewed the settlement papers with Fisher on October 16.

On October 23, Fisher informed Renbarger that Hall wanted to consult with someone else before signing. Fisher told Renbarger that he had advised Hall that it was too late for that, because an agreement had been reached. On November 4, Renbarger told Fisher of her intention to ask the district court to dismiss Hall's suit if the settlement agreement was not signed before November 18, the date on which the district court had scheduled another pretrial conference.

On November 8, Hall advised Fisher that he was still talking to some people about the settlement. On November 13, Hall called Fisher's office and told him he was obtaining new counsel. On the same day, Fisher indicated to Renbarger that he would file a motion to withdraw as Hall's counsel.

On November 14, Hall went to Fisher's office and picked up his case file. Fisher advised Hall that he intended to withdraw as counsel. Fisher also gave Hall two letters addressed to Hall from Fisher, advising Hall that a hearing was scheduled in his case on November 18, and gave him the address of the courthouse and room number. Hall signed both letters.

According to Fisher, Fisher told Hall that either he or his new counsel needed to be present at the hearing. According to Hall, Fisher told him his presence was not necessary. After picking up his file from Fisher on November 14, Hall consulted with another

attorney the same day because, according to Hall, he was "not satisfied with the settlement."

Renbarger spoke with Fisher by telephone again on November 14. Fisher told Renbarger that Hall had signed a letter that day, acknowledging that he no longer wanted Fisher to represent him. During the conversation, Fisher confirmed again that at the time he and Renbarger agreed to settle the case for $6,000, Fisher had authority from Hall to settle the case for that amount. Because the settlement agreement was not signed by Hall on November 18, San Bernard filed a motion to enforce the settlement.

The pretrial conference was held as scheduled on November 18. Fisher and Renbarger were present; neither Hall nor anyone representing him was present. The court granted both Fisher's motion to withdraw and San Bernard's motion to enforce the settlement agreement.

San Bernard sent a settlement check to Hall for $5,130 and a separate check to Fisher for $870. No appeal was taken from the court's order. Hall contends that the first time he heard of the settlement agreement between Fisher and Renbarger was when he received the settlement check.

On July 8, 1992, Hall's new counsel, Willie, filed a motion under FED. R. CIV. P. 60(b) to vacate the judgment. Fisher and San Bernard filed motions for sanctions under FED. R. CIV. P. 11 against Hall and Willie. Various affidavits were filed by all parties.

On October 9, 1992, the court held a hearing on the motion to vacate and motions for sanctions. The court considered the parties' briefs and affidavits, hearing the arguments of counsel, and spoke with Hall. The court found, by a preponderance of the evidence, that an oral settlement agreement had been reached between Fisher and Renbarger, that Fisher had been authorized by Hall to settle his case, and that the settlement was reasonable in light of the issues. The court also found that Hall had second thoughts about the settlement and had refused to sign the settlement agreement.

The court concluded that the testimony of Fisher and Renbarger was credible, that Hall's testimony was not, and that there was no factual, legal, or equitable basis for setting aside the judgment.

Finally, the court found that the accusations made against Fisher and Renbarger gratuitously impugned their integrity, were vexatious and reprehensible, and had no basis in fact, and awarded San Bernard $1,500 and Fisher $750 for expenses.

II.

Hall argues that the district court violated his due process rights and abused its discretion by not holding a "full" evidentiary hearing and refusing to permit Hall to present witnesses in connection with his rule 60(b) motion. We review the denial of a rule 60(b) motion for abuse of discretion.

An appeal from denial of rule 60(b) relief does not bring up the underlying judgment for review. Thus, appellate review of the denial of a rule 60(b) motion is narrower in scope than a review of the underlying order of dismissal, so as not to interfere with the requirements of a timely appeal. Browder v. Director, Dep't of Corrections, 434 U.S. 257, 263 n.7 (1978); Vela v. Western Elec. Co., 709 F.2d 375, 376 (5th Cir. 1983).

When a movant seeks relief from the underlying judgment based upon alleged fraud or misconduct of an adverse party under rule 60(b)(3), he

> must establish by clear and convincing evidence (1) that the adverse party engaged in fraud or other misconduct and (2) that this misconduct prevented the moving party from fully and fairly presenting his case . . . . The resolution of these two issues is within the trial court's discretion, and on review, our only inquiry is whether the trial court abused its discretion.

Montgomery v. Hall, 592 F.2d 278, 279 (5th Cir. 1979) (citations omitted). Abuse of discretion will not be found when the alleged fraud or other misconduct complained of is speculative. Fackelman v. Bell, 564 F.2d 734, 737 (5th Cir. 1977). Relief under rule 60(b)(6) for "any other reason justifying relief" is an "extraordinary remedy," and abuse of discretion requiring reversal of a ruling on

such motion will be found only in "extraordinary circumstances." Id.

A.

Hall argues that the district court violated his due process rights and committed an abuse of discretion by not holding a "full" evidentiary hearing and by refusing to permit him to present evidence and witnesses in connection with his rule 60(b) motion. The argument lacks merit for a number of reasons.

1.

On appeal of the denial of a rule 60(b) motion, we will not consider arguments that were not presented to the district court in connection with the motion. Williams v. Brown & Root, Inc., 828 F.2d 325, 329 (5th Cir. 1987). Hall did not argue to the district court that failure to hold a "full" evidentiary hearing on the rule 60(b) motion violated his due process rights. Since Hall did not protest the district court's decision to consider the motion based solely upon the information Hall had gathered already, we cannot conclude that the court abused its discretion. Id.

2.

If we consider the merits of Hall's claim, relief is still unavailable. Due process does not require holding a hearing for all rule 60(b) claims. U.S. Fidelity & Guar. Co. v. Lawrenson, 34 F.R.D. 121, 123 (D. Md.), aff'd, 334 F.2d 464 (4th Cir.), cert. denied, 379 U.S. 869 (1964). But see Laguna Royalty Co. v. Marsh, 350 F.2d 817 (5th Cir. 1965) (plaintiff entitled to hearing on motion to vacate judgment for newly discovered evidence that undermines basis for jury's verdict). Even if Hall was entitled to a hearing in this case, the hearing held by the court was sufficient.

Although Hall did not testify at the October 9, 1992, hearing, the court had several affidavits before it, including two from Hall. The court considered the evidence and credibility of the affiants

before making its findings. Hall had the opportunity to present affidavits to support his motion. Thus, his due process rights were preserved.

Hall relies upon Mid-South Towing Co. v. Har-Win, Inc., 733 F.2d 386, 390 (5th Cir. 1984), for the proposition that when a party is challenging the validity of a settlement agreement, an evidentiary hearing must be held. There are two flaws in Hall's reliance upon Mid-South Towing.

First, if Hall is arguing that the hearing held before the November 25, 1991, judgment was inadequate, that argument goes to the merits of the underlying judgment and is barred because that judgment was not appealed. Second, even if Hall now could properly complain about the merits of the underlying judgment, his argument is meritless. The district court held a hearing on the validity of the settlement on November 18, 1991. Hall had notice of the hearing but did not attend. Thus, he cannot challenge the validity of the settlement reached at that hearing. See Butler v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 528 F.2d 1390, 1391 (9th Cir. 1975).

B.

Hall contends that his due process rights were violated because San Bernard's motion did not contain certain averments required by S.D. TEX. R. 6A and because he was not given time to respond to San Bernard's motion to enforce the settlement as provided for by S.D. TEX. R. 6D. Hall did not present this claim to the district court in connection with his rule 60(b) motion. Whether the district court violated Hall's due process rights by not enforcing its local rules is a "pure question of law." Thus, we will reverse the district court only if the failure to apply the local rules would result in a "miscarriage of justice." Volkswagen of Am., Inc. v. Robertson, 713 F.2d 1151, 1166 (5th Cir. 1983).

1.

Rule 6A states that opposed motions shall

4. Contain an averment that

   a. The movant has conferred with the respondent and that

   b. Counsel cannot agree about the disposition of the motion;

   c. This requirement does not apply to motions for summary judgment or under Federal Rule of Civil Procedure 12(b), (c), (e), or (f).

S.D. TEX. R. 6A. Hall contends that he was deprived of due process because San Bernard's motion to enforce the settlement did not contain the averments required by rule 6A. But, San Bernard's motion to enforce the settlement was not required to contain the averments specified in rule 6A, as it was in the nature of a motion for summary judgment.[1] Under rule 6A, therefore, averments were unnecessary.

2.

Rule 6D states, "Submission: Opposed motion will be submitted to the judge twenty days from filing without notice from the clerk and without appearance by counsel." S.D. TEX. R. 6D. Hall argues that he was deprived of due process because the court granted San Bernard's motion without giving him twenty days to respond, as required by Rule 6D. This claim is without merit.

The hearing on November 18, 1991, was scheduled to be a pretrial conference. Under FED. R. CIV. P. 16(c)(9), pending motions may be disposed of at pretrial conferences.[2] Hall had notice of the pretrial conference but did not appear. Had he

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[1]Hall argues that the exception is not relevant because FED. R. CIV. P. 56 does not specifically enumerate an action to enforce a settlement agreement as a type of summary judgment. The term "claim" in rule 56(a), however, is broad enough to include the type of action brought here.

[2]See FED. R. CIV. P. 16(i): "Subjects to be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to . . . (9) the disposition of pending motions."

appeared, he could have responded orally to San Bernard's motion or requested more time to submit a written response.

C.

Hall contends that Renbarger and Fisher committed fraud on the court by representing that an oral settlement agreement had been reached between them and that it was an abuse of discretion for the district court to deny Hall's rule 60(b) motion to vacate. This claim is without merit.

FED. R. CIV. P. 60(b) provides, in part, as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reason (1), (2), or (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

It appears that Hall is proceeding against the alleged fraud of Renbarger under 60(b)(3) and against Fisher under 60(b)(6).

A party seeking to vacate a judgment based upon fraud, misrepresentation, or other misconduct of an adverse party under rule 60(b)(3) must establish by clear and convincing evidence (1) that the fraud, misrepresentation or other misconduct occurred and (2) that the conduct prevented the party from fully and fairly presenting his case or defense. Johnson v. Offshore Express, 845 F.2d 1347, 1358 (5th Cir.), cert. denied, 488 U.S. 968 (1988). We will apply the same standard to Hall's attempt to vacate a judgment under rule 60(b)(6) for Fisher's alleged fraud.

1.

Hall cites facts that he believes demonstrate convincingly that Fisher and Renbarger falsely and fraudulently represented to the court that an oral settlement had been reached. We disagree.

Hall gave Fisher the power to enter into a settlement agreement on his behalf. Fisher and Renbarger orally agreed to all of the material terms of the settlement. A party who orally agrees to a settlement may not back out of the agreement because of a disagreement with a non-material term of the written settlement agreement. See Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. Dec. 1981) (per curiam).

It was not clearly erroneous for the court to disregard Hall's affidavits as unreliable. For instance, Hall claims that the first time he heard of the settlement agreement between Fisher and Renbarger was when he received a settlement check. But Hall signed a letter indicating that he had reviewed the settlement papers with Fisher soon after the agreement was drafted. He also admits that he saw the written settlement agreement when he retrieved his file from Fisher. In fact, Hall dismissed Fisher as his counsel because of his dissatisfaction with the written settlement agreement. In light of the glaring incredibility of Hall's description of events, the court did not err by discounting the truth of his story.

2.

We need not resolve the factual issue of the events surrounding the settlement, however, because even if Hall could establish that Fisher and Renbarger fraudulently represented to the district court that an oral settlement had been reached, he cannot establish that he was prevented from fully and fairly presenting his case. Thus, he would not be entitled to relief under rule 60(b).

After Hall fired Fisher, Fisher notified him that a hearing was going to be held and gave Hall the date, time, and location of the hearing; thus, Hall had adequate notice thereof. His failure to present his case at the hearing was his fault, not the result of any

alleged fraud. Thus, the court did not abuse its discretion by denying Hall's rule 60(b) motion.

D.

Hall contends that the district court erred in enforcing the settlement agreement. We disagree.

"Federal law does not require . . . that a [title VII] settlement be reduced to writing. Absent a factual basis rendering it invalid, an oral agreement to settle a title VII claim is enforceable against a plaintiff who knowingly and voluntarily agreed to the terms of the settlement or authorized his attorney to settle the dispute." Fulgence, 662 F.2d at 1209. The district court's finding that Fisher had authority from Hall to settle is not clearly erroneous. Thus, Hall is bound by the settlement. Since the court did not abuse its discretion in holding that no fraud was committed, there is no other "factual basis" for denying enforcement of the oral settlement agreement.

III.

The court found that the accusations made by Hall in support of his rule 60(b) motion gratuitously impugned Fisher and Renbarger's integrity, were vexatious and reprehensible, and had no basis in fact. Consequently, the court imposed sanctions under rule 11 against Hall for his attempt to negate the oral settlement agreement. In doing so, the court did not abuse its discretion.

At all times relevant to this case, FED. R. CIV. P. 11 provided,

> . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as

> to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Sanctions are appropriate when a rule 60(b)(3) motion is frivolous, brought in bad faith, and prosecuted in violation of rule 11. In re Ginther, 791 F.2d 1151, 1154 (5th Cir. 1986). Sanctions also are appropriate where pleadings made baseless and scurrilous attacks on opposing counsel. Willy v. Coastal Corp., 915 F.2d 965, 968 (5th Cir. 1990), aff'd, 112 S. Ct. 1076 (1992).

There is substantial evidence to support the district court's imposition of sanctions. For instance, Hall and Willie accused Renbarger and Fisher of having committed fraud on the court by stating that Hall had agreed to settle his claim. They subsequently accused Renbarger of committing perjury. The court also found that Hall and Willie had failed to conduct proper investigation before alleging that Fisher lacked authority to settle on Hall's behalf.

The imposition of rule 11 sanctions creates a risk of chilling vigorous advocacy; thus it should be invoked cautiously. See McMahon v. Shearson/Am. Express, 896 F.2d 17, 22 (2d Cir. 1990). Given the facts and the district court's appraisal of the evidence, however, the court did not abuse its discretion by imposing sanctions upon Hall and his counsel.

AFFIRMED.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON, TEXAS

LOYD E. HALL,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-91-1890
	§	
SAN BERNARD ELECTRIC, INC.,	§	
Defendant.	§	

ORDER

1. Hall's motion to vacate the final judgment of November 21, 1991 (#14) is denied.

2. San Bernard's motion for Rule 11 sanctions (#18) is granted. Hall and Joseph R. Willie, Hall's attorney, are jointly and severally ordered to pay San Bernard's reasonable expenses of $1500.00.

3. Fisher's motion for Rule 11 sanctions (#17) is granted. Hall and Willie are jointly and severally ordered to pay Fisher's reasonable expenses of $750.00.

Dated this 15th day of Oct., 1992.

/s/ Lynn N. Hughes
Honorable Lynn N. Hughes
UNITED STATES DISTRICT JUDGE

APPENDIX "D"

United States District Court **Southern District of Texas**

LOYD E. HALL,	§	
Plaintiff,	§	
	§	
versus	§	CIVIL ACTION H-91-1890
	§	
SAN BERNARD ELECTRIC, INC.,	§	
Defendant.	§	

FINAL JUDGMENT

1. Based on the parties' settlement agreement, Hall's claim is dismissed with prejudice.
2. The settlement is for $6,000. Of that, Hall receives $5,130, and Harrison R. Fisher, Sr., Hall's attorney, receives $870 for fees and costs.
3. The defendant's oral motion for expenses is denied.
4. Fisher's motion to withdraw as attorney for Hall (#10) is granted.

Signed on November 21st, 1991, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX "E"

FEDERAL RULES OF CIVIL PROCEDURE

Effective September 16, 1938

Including Amendments Received Through February 1, 1992

RULE 83. RULES BY DISTRICT COURTS

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

[Amended effective August 1, 1985.]

APPENDIX "F"

LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Effective May 1, 1988

Including Amendments Received Through February 1, 1992

RULE 6. CIVIL PRETRIAL MOTION PRACTICE

A. Form. Opposed motions shall:

1. Be in writing;
2. Include or be accompanied by authority;
3. Be accompanied by a separate form order granting the relief; and
4. Contain an averment that
   a. The movant has conferred with the respondent and that
   b. Counsel cannot agree about the disposition of the motion;
   c. This requirement does not apply to motions for summary judgment or under Federal Rules of Civil Procedure 12(b), (c), (e), or (f).

APPENDIX "G"

LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Effective May 1, 1988

Including Amendments Received Through February 1, 1992

RULE 6. CIVIL PRETRIAL MOTION PRACTICE

D. Submission. Opposed motions will be submitted to the judge twenty days from filing without notice from the clerk and without appearance by counsel.